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Supreme Court of the United States

OCTOBER TERM, 1953

No. 415

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

C. W. JOINER, JR., and WAYNE JOINER,
by his father, C. W. JOINER, JR.,
as next friend,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(AND BRIEF IN SUPPORT)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT)

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 26, 1953, rehearing denied August 11, 1953.

OPINION BELOW

The opinion of the Court of Appeals is reported in 205 F. 2d 426 (Adv. Sh. September 7, 1953). A copy will be seen at page 376 of the Record. The opinion affirms a judgment of the District Court for the Middle District of Georgia in connection with which no opinion was rendered.

JURISDICTION

The judgment of the Court of Appeals having been entered June 26, 1953 (R. 376), and that Court having denied petition for rehearing on August 11, 1953 (R. 408), the jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1254(1). The Court of Appeals, on August 19, 1953, stayed its mandate for 60 days.

QUESTIONS PRESENTED

1. Whether the standard of care and conduct prescribed by the Court of Appeals for the operation of railroad trains at grade crossings reasonably can be observed; and

2. Whether such standard conflicts with the standard laid down by the law of the state.

STATUTES INVOLVED

The pertinent statutory provisions are Secs. 320.45, 768.05 and 768.06, Fla. Stat. 1941 as set forth in the Appendix hereto.

STATEMENT

The action is a consolidated proceeding brought by Respondents as plaintiffs to recover for the death of the wife of Respondent C. W. Joiner, Jr., and for serious personal injuries sustained by his son, the Respondent Wayne Joiner, resulting from a collision in the State of Florida between a Coast Line train and an automobile driven by Respondent C. W. Joiner, Jr., in which the wife and son were passengers.

C. W. Joiner, Jr., received a jury verdict for $15,363, and Wayne Joiner for $30,000; judgments were entered on the verdicts, and the judgments were affirmed by the Court of Appeals.

The collision occurred in the countryside about one-half mile distant from a small village. The railroad track and the highway there cross each other at an angle of approximately 62 degrees. The highway was ordinarily a heavily traveled one, but at the time of the collision no other automobile, according to plaintiff's testimony, was in sight. The accident occurred about 8:00 o'clock in the forenoon of a cold, clear morning.

The highway is straight and level in the direction from which the automobile came for approximately one-half mile, and the track is straight and level from the direction whence the train came "for several miles," as the Court of Appeals said (R. 377).

At and adjacent to the crossing the railroad right of way is 130 feet wide.

As the automobile bore down on the crossing, coming from the west, it was traveling at least 45 miles per hour; and the train, approaching the crossing from the north, was running 50 miles per hour (R. 307) as recorded by the engine's speed tape whose integrity is not disputed (R. 303) nor its accuracy impugned, except by the motorist who, in the moment of his realization of the mortal danger upon him, estimated the speed at 70 or 75 miles per hour (R. 112).

As the automobile proceeded towards the crossing its driver was confronted, at a point 225 feet west of the crossing with the standard highway railroad sign, which is seen in Defendant's Exhibit 3, and, diagramatically, in Defendant's Exhibit 2, photostatic copies of which are shown at the end of this document.[1]

One hundred and ninety-six feet before the motorist would have reached the crossing, he passed the conventional "STOP—FLA. LAW—R. R. CROSSING" sign, which is shown in the same exhibits.

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[1] The original exhibits in the case are transmitted to this Court along with the record.

However, the automobile driver did not see the approaching train or hear its horn and bell until his automobile was within 120 feet of the crossing (R. 132); although it is not disputed that the train was giving the familiar horn and bell signals of its approach (R. 270, 286, 180, 245, 168, 169).

When the driver saw and heard the approaching train, he realized he could not stop his automobile (R. 108). He drove his car off the paved highway at a point approximately 60 feet west of the crossing; the automobile, then off the pavement, turned over some 50 feet west of the track, and struck the train (R. 108) seven or eight feet behind the front of the engine (R. 272), at which time the engine was between 30 and 45 feet (R. 289) south of the crossing. The engineer was keeping an appropriate lookout (R. 271); but, as the Court of Appeals said, "could not have seen an approaching automobile when the train was more than 150 to 200 feet from the crossing . . ." (R. 378). His attention was first attracted to the highway on the east side of the crossing (R. 271, 272), and when he looked to the west side of the crossing, at a time when his engine was 150-200 feet north of the crossing (R. 276), he first observed the automobile, at which time it had left the highway and was turning over. Every attempt immediately was made to stop the 14-car train before the collision (R. 166), unsuccessfully of course; but the prompt application of the emergency brake that the engineer made stopped the train in the short distance of 738 ft. (R. 273), with the eleventh car of the train on the crossing.

SPECIFICATION OF ERRORS URGED

The Court of Appeals erred:

1. In enforcing a standard of care and conduct for the operation of railroad trains at grade crossings that reasonably cannot be observed;

2. In omitting to apply the standard of such care and conduct laid down by the Florida law.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has laid down here a standard of train operation to be observed by locomotive engineers which cannot be complied with if the rail transportation of the nation is to move with the speed demanded by the traveling and shipping public.

It is not simply a question of the operation of this particular train at this particular crossing. It is a question of the operation of hundreds of trains every day and night over thousands of highway grade crossings in the State of Florida, and in the other states in the Fifth Circuit, namely, Georgia, Alabama, Mississippi, Louisiana and Texas.

2. The standard applied by the Court of Appeals is not that prescribed by the Florida law.

THE CROSSING LAW OF THE FIFTH CIRCUIT COURT OF APPEALS

This is the latest of three cases in a series decided by the Court of Appeals, each of which expresses the views of that Court on the subject, with scant attention to the Florida authorities. The two prior cases are:

Lowry v. Seaboard A. R. Co., 171 F. 2d 625 (1948);

Atlantic C. L. R. Co. v. Pidd, 197 F. 2d 153 (1952).

In *Lowry* the Court of Appeals refused to hold the trial court wrong for refusing to direct a verdict for the railroad because, said the Court, "whether a verdict should be directed in a federal court is a matter of federal law"; and, stating that the federal law was laid down by this Court in *Grand*

Trunk Ry. Co. v. Ives, 144 U.S. at page 417, the Court of Appeals added: "Under this rule, invoked by the railroad company here by removing the case to the federal court, we think there was matter, as above pointed out, for a jury to decide." 171 F. 2d at page 630.

The year before, that Court, in a case which went to it from a Louisiana district court, *Henwood v. Wallace,* 159 F. 2d 263, said that the question on appeal before the Court of Appeals is not what the members of the Court would have done if they had been members of the jury, or what a Louisiana trial court without a jury would or should have done, "or even what the Supreme Court of Louisiana would do in reviewing the case upon both the law and the facts."

Quite obviously, there is no consonance or concord between those views and the statement in *Smyth v. Ames,* 169 U.S. 466, 516, that "A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; . . .".

Atlantic Coast Line Railroad Company unsuccessfully sought certiorari in *Pidd's* case, cert. denied November 10, 1952. But Petitioner is not here in this case frivolously so soon after that denial in *Pidd*—it is here because this case illustrates, almost perfectly, the thing that was anticipated and feared from *Pidd:* that the Court of Appeals for the Fifth Circuit was creating precedents and establishing principles having to do with the operation of interstate trains that could not, in the practical operation of a railroad, be complied with, and that such a result could not stand in the face of the more reasonable requirements of the Florida cases on the subject.

The opinion in *Pidd* cites indiscriminately not only Florida cases, but prior cases by the Court of Appeals for the Fifth Circuit which have little, and cases from other jurisdictions which have no, bearing on the question in hand. The opinion

of the Court of Appeals in this case of *Joiner* cites *only Pidd*, two Florida cases decided in 1905 and 1907 respectively, and a case by the Second Circuit. Neither *Pidd* nor *Joiner* cited the following crossing-collision-cases from Florida, each of which demonstrates that in a case like this the speed of the train will not by the Florida courts be held to be actionable negligence:

Atlantic C. L. R. Co. v. Timmons, 160 Fla. 754, 36 So. 2d 430 (1948);

St. Louis-San Francisco Ry. Co. v. Baker, — Fla. —, 49 So. 2d 324 (1950);

Powell v. Gary, 146 Fla. 334, 200 So. 854 (1941);

Florida E. C. Ry. Co. v. Davis, 96 Fla. 171, 117 So. 842 (1928);

Covington v. Seaboard A. L. Ry. Co., 99 Fla. 1102, 128 So. 426 (1930).

THE UNREASONABLENESS OF THE COURT OF APPEALS' STANDARD

Manifestly all that could be complained of here as actionable negligence is the speed. True there was no watchman at the crossing, no crossing gates, and no flashing signals. But the absence of any of those specific warnings cannot be counted for negligence under the Florida law, for their necessity is not for the consideration of a trial jury (*Atlantic C. L. R. Co. v. Wallace*, 61 Fla. 93, 54 So. 893 [1911]), but is rather as the Court of Appeals conceded in *Pidd* (197 F. 2d at 156, Footnote 2) "a legislative function"; and in *Lowry's* case (171 F. 2d at 627) the Court of Appeals said that "custom and general usage has not made them [such specific warning devices] the ordinary equipment of a railroad crossing."

That being so, what could the railroad or its employees operating the train have done to have avoided this Joiner accident? Should they have operated the train so slowly that it could have been stopped before reaching the crossing after the motorist discovered the deadly peril into which he had driven himself?[2] If that is a lawful requirement, the railroads of the nation are in a worse competitive plight than they think they are.

It is certain and plain that such a restriction cannot be complied with in Georgia, Florida, Alabama, Mississippi, Louisiana or Texas if railroad trains in those states are to maintain their required fast schedules; and that such schedules can be maintained only if the railroad, bound by the economic and competitive necessities to maintain the schedules if it is to survive, chooses to shut its eyes to the standard and to take the chance that other heedless motorists will not bring further liability upon the company.

To one only slightly familiar with the practical, and inescapable, necessities of railroad operation, the restrictive requirements laid down by the Court of Appeals respecting the operation of modern, high-speed trains comes perilously close to encountering the interdiction of *Seaboard A. L. Ry. Co. v. Blackwell*, 244 U. S. 310 (1917), which invalidated a provision of a Georgia statute which required the engine of a train to begin checking its speed 400 yards before reaching public road crossings at grade, and to keep checking the speed so that the train might be stopped in time to prevent a collision if any person or thing should be crossing the track on the highway.

This Court has not considered a grade crossing case since 1934 when it decided *Pokora's*, 292 U. S. 98, and *Fairport P. & E. Co. v. Meredith*, 292 U. S. 589, since when transportation

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[2] Recall, please, the Court of Appeals' observation that the engineer could not have seen the automobile when the train was more than 150-200 feet from the crossing (R. 380).

speeds have increased everywhere due to the pressure of insistent public demand and, almost everywhere, the courts have taken notice of that demand and have refused to charge railroads with negligence for operating trains through the countryside at speeds of 55, 60, 75, 80 miles per hour. *Constantine v. Pennsylvania R. Co.* (7th Cir. Ind., 1940) 114 F. 2d 271, 274; *Robins v. Pitcairn* (7th Cir. Ill., 1941), 124 F. 2d 734, 736; *Baltimore & Ohio R. Co. v. Deneen* (4th Cir. W. Va., 1947), 161 F. 2d 674, 676; *Plough v. Baltimore & Ohio R. Co.* (2nd Cir. N. Y., 1949), 172 F. 2d 396, cert. denied 337 U.S. 940. *Cf. Kenan v. Austin* (1941), 146 Fla. 389, 1 So. 2d 174, not with respect to speed, but for its holding that the Florida courts "are conscious of the demand of the public on the railroad companies for speed and efficiency and that such demand should be met."

CONCLUSION

The points presented by this petition seem to us so important to the operation of all railroad trains in the Southeast as to justify the consideration of this Court; and we hope that the Court will think so too.

Respectfully submitted,

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APPENDIX

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FLORIDA STATUTES, 1941.

"320.45 *Crossing railway tracks.*

"No person operating any motor vehicle upon a public road shall cross, or attempt to cross, at a point designated by the state road department as a dangerous crossing, any railroad track intersecting the road at grade other than a crossing at which there is a gate or watchman (except on electric railway tracks in an incorporated city or town) without first bringing said motor vehicle to a full stop at a distance of not less than ten feet nor more than fifty feet from the nearest rail, and shall then look in both directions along the tracks and listen for the approach of any locomotive, car or train of cars thereon; provided, however, that the requirements of this section shall not extend to railroad tracks located within the limits of incorporated cities or towns; and provided further, that in any civil action for damages against any railroad company for alleged actionable injuries sustained by any person at any railroad crossing in this state by reason of a collision at said crossing with any engine or train of cars, the provisions of §§768.05 and 768.06 relating to liability of railroad companies in actions for negligence shall govern."

* * * * * * *

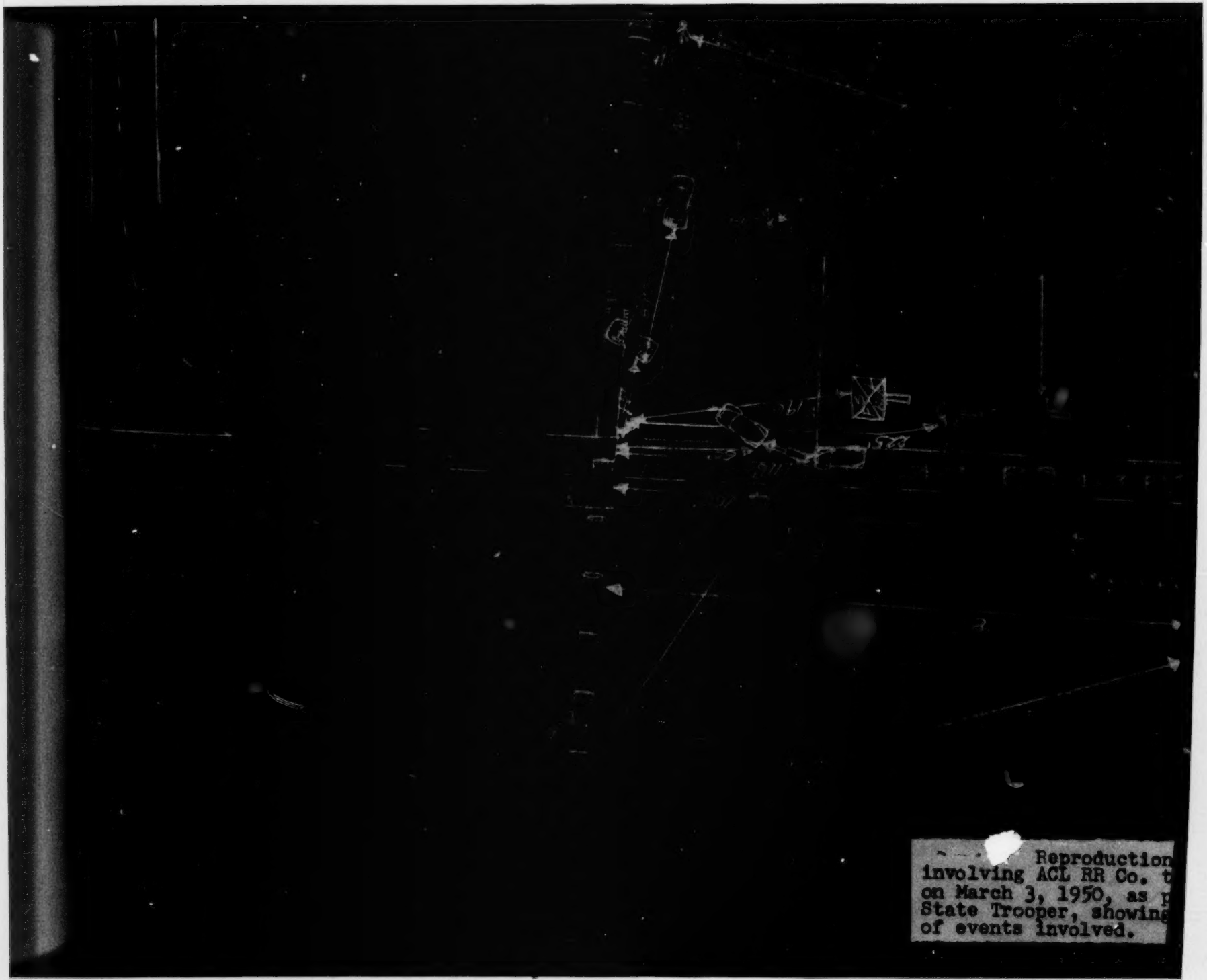
"768.05

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars, or other machinery of such company, or for the damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

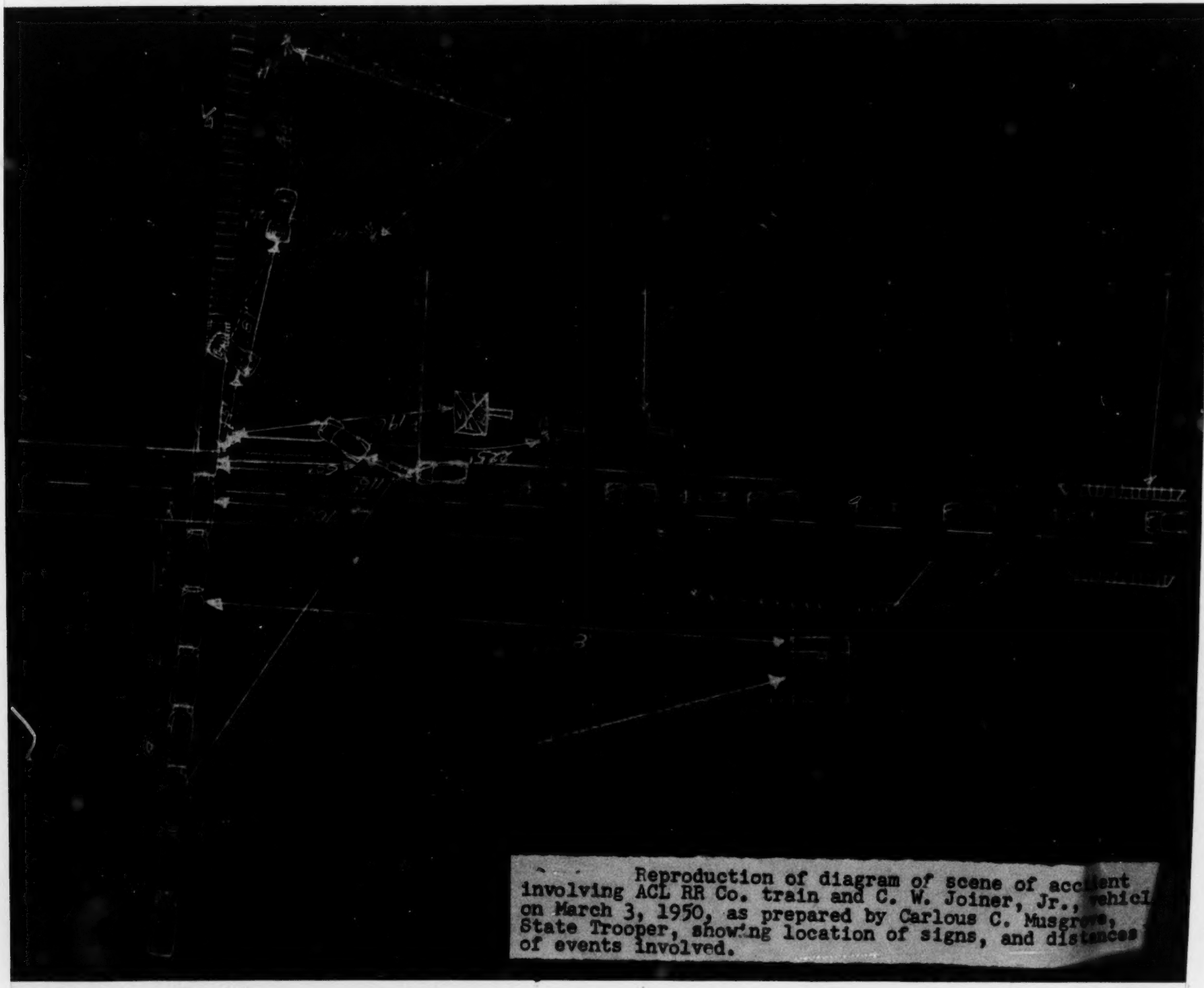
* * * * * * *

"768.06 *Comparative negligence.*

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."



Reproduction
involving ACL RR Co. t
on March 3, 1950, as p
State Trooper, showing
of events involved.



Reproduction of diagram of scene of accident involving ACL RR Co. train and C. W. Joiner, Jr., vehicl on March 3, 1950, as prepared by Carlous C. Musgrove, State Trooper, showing location of signs, and distances of events involved.

DEFENDANT'S EXHIBIT 3.

CAMERA 274 FEET WEST OF CROSSING, FACING EAST IN CENTER OF HIGHWAY - CAMERA EYE LEVEL - 5 FEET.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 415.

ATLANTIC COAST LINE RAILROAD COMPANY,
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versus

C. W. JOINER, JR., and WAYNE JOINER, by his father, C. W. JOINER, JR., as next friend,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 205 F. 2d 426 (Advance Sheet, September 7, 1953) and appears in the record at page 377. The opinion affirms jury verdict and judgment of the District Court in plaintiffs' favor in connection with which no opinion was rendered.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. Code, Section 1254 (1). Respondents submit that this is not a case in which this Court should accept jurisdiction. Objections to the jurisdiction are included in our argument.

QUESTIONS PRESENTED.

The one simple question presented is whether the Court of Appeals has prescribed a standard of care and conduct for train and motorist at grade crossings which is or is not in accord with the standards laid down by the appellate court of Florida.

Attempt is made to provoke the question that the Court of Appeals has prescribed standards which cannot reasonably be observed by the railroads, but, even if true, this is beside the point so long as the standards laid down by Court of Appeals is agreeable with the interpretations placed on existing pertinent Florida statutes by the highest appellate court of the latter state.

The desirability of the pertinent, existing statutes governing standard of care and conduct for train and motorist at grade crossings is a matter which rests with the legislature of Florida.

The interpretation of such statutes rests with the Supreme Court of the State of Florida.

We are only concerned here as to whether the Court of Appeals has followed the holdings of Supreme Court of Florida in similar cases, and that they are in accord cannot be seriously questioned.

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 320.45, 768.05, and 768.06, Florida Statutes, 1941, as set forth in appendix to petition for certiorari.

STATEMENT.

Petitioner has omitted many pertinent facts which we would here briefly state so that it will be demonstrated petitioner was grossly and responsibly negligent in this accident under any standard of care dictated by reasonable prudence.

EXHIBIT ATTACHED TO PETITION.

Applicants have attached photostat of photograph of scene of accident which does not show the signs as they were at the time of the accident, according to the testimony of two of applicants witnesses on the trial—Patrolman Musgrove and witness Matthews. For a true picture of the crossing in relation to the view Joiner had,

we refer the court to photographs of plaintiffs which are part of the record.

DRIVER OF MOTOR VEHICLE NOT FAMILIAR WITH CROSSING.

It is undisputed that the driver of the motor vehicle in our case was unfamiliar with the crossing, and did not become aware of it until he was within 120 feet of same, which was the first view that any motorist would have had of train approaching from North at same distance the train in this case was from crossing at time.

HEAVY TRAFFIC VOLUME AT CROSSING.

Petitioner makes no reference to heavy traffic flow at subject crossing, but would give the impression that it was at some isolated and secluded "countryside" which is completely misleading, it being at the edge of a village and on one of the primary, arterial highways of Florida where there was congested motor vehicular activity. Engineers of State Road Department of Florida testified that the highway was one of the heavier traveled highways in Florida,—"one of our primary roads"—and that in March, 1950, their mechanical checking devices showed an average of 2543 vehicles passing per day in proximity of crossing, and that on March 3, 1950, (date of accident) there were 2715 vehicles passing this point. The trainmen were familiar with heavy flow of traffic and ob-

structed nature of crossing, and that there were no automatic signal devices to warn motorists unfamiliar with the environment thereat.

DANGEROUS AND OBSTRUCTED NATURE OF CROSSING.

Plaintiffs' photographs in the record, aerial and ground leyel, demonstrate that the crossing involved was dangerous and view-obstructed to the extent that neither train nor motor vehicle could be brought to stop before collision after they should become aware of the approach of the other, which makes it more culpable of the railroad, knowing of the environment at the crossing, in approaching same at reckless and abandoned speed, and without having train under control, and knowing that thousands of motorists who are unfamiliar with such crossing, and its misleading appearance, traverse it daily, in which category Joiner found himself on the morning of the accident.

The photographs show a solid wooded area on both sides of the railroad right of way on the North side of crossing, from which direction the train was traveling in this case, which gives to the motorist approaching from the West a deceptive picture of solid woods, without being able to see the break, or opening, caused by the railroad right of way, until right upon the crossing, and this is accentuated by the angle of approach of track to this crossing from the North.

Added to hidden aspects of crossing, we have road intersection immediately East of it which attracted Joiner's attention, he being curious at the time as to which road he would take to follow his desired route, and the further distractions of service stations, novelty shops, restaurants, motor courts, state park, and many commercial signs around Suwannee River bridge, and the village of Fannin Springs, which would render unnoticeable the almost inconspicuous and colorless warning signs placed some distance from the crossing by the railroad or the State Road Department.

We here appropriately point out that in the very recent decision of the Supreme Court of Florida,—*Atlantic Coast Line Railroad Company v. Smith,* 53 So. 2d, page 301, (1951),—the element of distractions to motorists was taken into consideration in determining relative responsibility of railroad and motorist at grade crossing accident, in this language, to-wit:

> "The care required to be exercised by railroad at crossing is one of degree and must be commensurate with danger prevalent at crossing and it may not always be enough to blow whistle and ring bell, *particularly where tracks of railroad are in congested area where vision is obstructed and various and sundry noises and other distractions are prevalent.*"

SPEED AT CROSSING.

Petitioner states that "manifestly all that could be complained of here as actionable negligence is the speed"....

of its train. While there are other factors of negligence charged and proven against petitioner in this case, such as failure to keep lookout, failure to give appropriate signals to approaching motorist, failure to have train under control commensurate with the known dangers of this crossing, which would authorize recovery by plaintiff, the speed alone of the train as it approached subject crossing convicted petitioner of gross negligence. Since petitioner is admitting that the speed of its train at crossing could be actionable negligence, we will demonstrate that its speed at this crossing was culpably negligent, and more than any other factor, responsible for the accident.

We can take the evidence of defendant's witness alone and prove that the speed at which this train approached the crossing was needlessly dangerous.

Lay aside defendant's photographic Exhibit 6 purporting to show that the engineer at 425 feet out could have seen a car 274 feet from the crossing. Lay aside the evidence of the fireman that the brakes were only applied on the northern edge of the pavement at the crossing. Lay aside the engineer's statement that he first saw the car when it was turning over, which placed it 30 to 40 feet, at the most, from the track. Take as true, for the sake of argument, the engineer's repeated generality that one could see from an approaching train from the North, a motorist approaching from the West, the direction from which Joiner was traveling, a distance of 150 to 200 feet, as he concludes he did on this date, but that at the speed of 49 miles per hour, which he says he was

traveling as he approached the crossing, he could not have stopped the train in time to avoid the collision, then upon this premise alone, our conclusion that he approached the crossing in question at a negligent rate of speed is established.

We need go no further to convict the defendant of careless, indifferent and gross negligence in approaching this crossing, and when we add to this fact that the speed of the train as it approached the crossing, in light of the contradictory evidence of the engineer to which we will later advert, was more nearly 75 miles per hour, and that he was increasing speed rather than slowing or coasting for any contingency, and with no lookout, and stated that he never did slow down for this crossing (R. 280) which he knew or should have known was heavily traveled, we feel that the trial court should have charged the jury that the speed of this train as it approached the crossing was negligent as a matter of law, it not being disputed that it was operated at such a speed that it could not stop within the range of its vision of approaching motorist from the west, and, therefore, it might as well have approached the crossing at 75 to 100 miles per hour, and without any brakes or lookout, for neither would have availed anything in light of the obstructed view, at the speed he was traveling.

The fireman testified that the train was not permitted to run over 59 miles per hour, with 5 miles play for dips and down hill runs (R. 266) with an allowance speed of 59 miles per hour, at this crossing, which we say is negligence within itself. The engineer testified

that on this particular run from Albany to Tampa that he did not exceed 59 miles per hour at any point over a mile or two (R. 280) and the permission to exceed the 59 mile speed limit by five miles on certain terrain had been withdrawn. For the purpose of testing the credibility of the witness, and impeaching his testimony as to speed, we stipulated for the record, answer to interrogatories made by the defendant railroad company (R. 166), to show that according to their own records and despite the apparent positive testimony of the trainmen and mechanical tape, that they had not exceeded 59 miles per hour on this run, the first recorded stretch of road below the accident was from Chiefland to Otter Creek, according to their Time Table a distance of 13.3 miles (plaintiffs' Exhibit 8) and the train made this run in eleven minutes, or an average speed of 72.4 miles per hour; that the run from Otter Creek to Gulf Hammock, a distance of 5.6 miles, was made in 6 minutes approximately 60 miles per hour, and the run from Gulf Hammock to Dunnellon, a distance of 23 miles, was made in 23 minutes, an average of 60 miles per hour, and that the entire distance of 41.9 miles from Chiefland to Dunnellon required only 40 minutes, or an average of 62.7 miles per hour, and we must take into account that surely they slowed down through some of these various communities, or did they—?

If not a single eye witness had survived the accident, we could have determined, from the location of the bodies and vehicle thereafter, that the train was travelling at a terrific speed. The car left the pavement some 60 feet from the crossing, and somewhere between there and the railroad turned over, maybe once or more, but

had to some extent lost its force by the time it went up the embankment and was hit by the train. It was turning in a Southeastern direction, so we must conclude that having been knocked Southwesterly from the point of impact, that this was solely by the force and impact of the train and not under its own impetus. One may draw his own conclusion as to the speed of the train from the following undisputed, physical facts. The car was knocked to a point 89 feet South of the crossing, and 26 feet west of the crossing, which was 44 feet from the point of impact with the train, and the wife of Joiner was thrown clear of the car, an additional, incredible distance of 44 feet down the right of way, and his son, Wayne, was thrown 14 feet clear of the car.

If the engineer could have seen the car at 425 feet North of the crossing, as indicated by defendants' pictures, or if he could have seen it at 200 feet from the crossing, and keeping the proper vigil had immediately applied his brakes, doubtless he would not have been able to completely stop the train, but he might have slowed it sufficient for Joiner to have cleared the track ahead of him, with less dire results, or if he had hit him, it is possible that he would have turned the car over only one or two times, and not thrown Mrs. Joiner and the boy clear of the car, and possibly spared the life of Mrs. Joiner and with less serious injuries to the boy.

As was said by Judge Strum, in the recent case of *Seaboard Airline Railroad Company v. Bailey,* (190 F. 2d, page 817 (10)) if the engineer had been keeping proper lookout, the train could have been substantially slowed, if not stopped, and doubtless he had in mind the like-

lihood of lessened injuries from lighter impact of slowed train.

FAILURE TO KEEP PROPER LOOKOUT.

The photographs used by plaintiff on trial would indicate a train approaching this crossing as was the case in subject accident, would see an approaching motorist several hundred feet up the track. The engineer made the general statement that it could be seen from 150 to 200 feet up the track. However, the fireman testified that the brakes were not applied until the engine was on the northern edge of the pavement, and this corroborates the evidence of the engineer that he did not see Joiner until he was turning over some 30 feet from the track, this places the train on the crossing before the engineer actually looked to see if there was an approaching motorist, which obviously was no lookout at all.

FAILURE TO GIVE WARNING.

Whatever warning by way of whistles or bell was given by petitioners train operatives on this occasion, it was not sufficient to warn those whom it was intended to protect, and, therefore, did not meet the requirements of a prudent approach to this crossing.

Defendant's witnesses who were near the crossing, and who could have heard the whistle if it had blown, did not hear it until the train was out in the open in the crossing, and too late to warn Joiner of its approach.

COMPARATIVE NEGLIGENCE OF THE PARTIES.

Under Florida Statutes of 1941, Section 768.06, the railroad is responsible in grade crossing accident for whatever proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant, and this is true irrespective whether the negligence of the railroad is only one percent or one hundred percent. *Stringfellow v. Atlantic Coast Line Railroad Company, 64 F. 2d, page 173,* in which certiorari was granted, (290 U. S., page 322, 54 Supreme Court 175), and in which the Supreme Court of the United States held that the railroad has no total defense in such cases except by proving that in fact plaintiff alone, and itself in no degree caused his injury.

Under repeated rulings of the Florida Supreme Court, to which we will make reference later, the duties of a train operative and a motorist approaching a crossing are mutual and reciprocal, and the conditions existing at the crossing at the time of the accident constitute the measure of duty resting upon the train operatives on the one hand, and the traveler upon the public highway upon the other.

The question resolves itself into which of the two parties acted with the most prudence taking into consideration the foreseeable danger on the part of each, and this question turns largely on the question of the knowledge that each had of the empending dangers as it went upon the crossing.

On this very real and determining question, the sole fault for the collision falls heavily on the railroad. The railroad knew that this was an obstructed crossing, with a view of motorists approaching from the west at the most of 150 to 200 feet, they knew that this blind crossing was unprotected by way of automatic signal devices to warn the public of an approaching train, they knew or should have known that each 30 seconds on the average a motorist came over this crossing, and yet with the certain knowledge of the hazards involved, they approached this crossing with increasing speed, knowing that if a hapless, unwary motorist should blindly and unsuspectingly have the dice of life throw him upon the crossing at the time the train came by, there was nothing that the train could do about it except hit him, and this factor was not weighed or taken into consideration, although a slow down on the part of only four trains per day (R. 298), against the dogmatic and incredibly unreasonable demand that 2500 vehicles per day stop and crawl up to the track, would not have discommoded the schedule of the train more than a minute or two.

ARGUMENT.

We take it there is no issue that contributory negligence of automobile driver in Florida railroad crossing cases is not a complete defense. Under the comparative negligence doctrine (Section 769.06, Florida Statutes), if the negligence of both parties proximately contributed to the accident, the plaintiff may still recover but the amount of recovery is reduced in proportion to the auto-

mobile driver's negligence. The case of *Stringfellow v. Atlantic Coast Line Railroad Company* was first reviewed by Fifth Circuit Court of Appeals (64 F. 2d 173), then by the Supreme Court of the United States (290 U. S. 322), and remanded back to Fifth Circuit Court of Appeals for further review (67 F. 2d 1012), and in the final opinion of latter court, it was held that

> "The opinion of the Supreme Court holds that the railroad company has under Florida law no total defense against the homicide of Stringfellow except by proving that in fact he alone, and itself in no degree caused his injury."

In our case the jury reduced the damages to the father-driver of the motor vehicle involved by approximately forty percent, and to the son-guest some twenty five percent, which was charging them with more negligence than the facts authorized.

The contributory negligence doctrine prevailing in Florida as affects damage by railroads was sustained against attacks on its constitutionality in 1942 in case of *Loftin v. Crowleys, Inc., 8 So. 2d 909.*

PETITIONER'S ATTACK ON FIFTH CIRCUIT COURT OF APPEALS STANDARD OF CARE IN RAILROAD CROSSING ACCIDENTS.

The merits of petitioner's case have suffered three concurring, adverse rulings,—jury verdict, approval of U. S. District Judge of verdict, and approval of Fifth Cir-

cuit Court of Appeals. In its zeal to once again have them retried, and knowing that it cannot, in this proceeding, question the standard of care and conduct prescribed by the Florida appellate court for train and motorist at grade crossing accidents, it here conveniently embraces the standards laid down by the Florida appellate courts, characterizing them in its brief as being "more reasonable requirements", and as last resort charges that the Fifth Circuit Court of Appeals has given birth, just of late, to a rule governing grade crossing accidents wholly repugnant to, and in total disregard, of the Florida appellate court rules.

The rulings in the *Joiner* (this case), *Pidd* (197 F. 2d 153), and *Lowrey* (171 F. 2d 153), which are criticized as representing a new and burdensome standard of conduct for railroads at grade crossings, are entirely consistent with precedents of both the Fifth Circuit Court of Appeals, and the Florida Supreme Court, through the years, and are more favorable to the railroad than is justified by the ratio of increased motor vehicular over rail travel through the years. As a matter of fact, the Florida Supreme Court has been more cognizant of the rights of motorists at grade crossing accidents than has the Fifth Circuit Court of Appeals and we will cite decisions bearing on this later.

COMPARISON OF PIDD CASE WITH RULINGS OF FLORIDA STATE SUPREME COURT.

Petitioner makes its main attack on the *Pidd* case in which certiorari to this court was unsuccessfully sought in 1952. It contends the *Pidd* and *Lowrey* cases are the genus and forerunners of future holdings of the Fifth Circuit Court of Appeals which prescribe rules of care and conduct at grade crossings which railroad cannot comply with and *"which could not stand in the face of the more reasonable requirements of the Florida cases on the subject."*

To resolve the only question in this case, that is whether the Circuit Court of Appeals and the Florida Supreme Court decisions are in accord, let us examine a number of them.

The standard of care laid down in the *Pidd* case is in substance, that

> "The duties and obligations of a railroad company and of a traveler on the highway at a public crossing are mutual and reciprocal. The trains have the right of way, and it is the duty of a highway traveler to give them precedence, but it is also the duty of the railroad company to exercise reasonable care for the safety of travelers on the highway, to give warnings of a train's approach which will be reasonably effective in the circumstances, and to have its train under control appropriate to the circumstances. It is of course the duty of a traveler on the highway to exercise reasonable care for his own safety. The de-

gree of diligence and caution to be exercised by each is such as a prudent man would exercise in the circumstances involved. Roberts v. Powell, 137 Fla. 159, 187 So. 766; Texas & P. Ry. Co. v. Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. Ed. 1132. A railroad company can not regulate or remove obstructions which are off its right of way. But it can, and should, regulate the speed of its trains, and the signals of their approach at crossings, so as to give reasonably adequate warning in the circumstances to a traveler who is exercising reasonable care for his own safety. Atlantic Coast Line Railroad Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L. R. A., N. S., 307."

In the early Florida case of *Florida Cent. and PH Co. v. Foxworth, (41 Florida, page 1-25 So. 338)*, substantially the same rule as in the *Pidd* case was laid down, that is, that "the duties of a railroad company with respect to care in operating its trains are dictated and measured by the exigencies of the occasion, or in the light of the conditions of things at the place where and the time when, an accident happens" and this "follows from the general rule requiring them (railroads) to measure their precautions by, and to make them reasonably commensurate with, the conditions and circumstances by which they are surrounded." This case arose in 1891 and was decided by the Florida Supreme Court in 1899.

The *Pidd* case follows almost verbatim the holding in case of *Atlantic Coast Line Railroad Company v. Watkins, 121 Southern, page 95* (Florida-1929) in which the following principle was laid down:

(12, 13) The relation of a railroad company operating a train at a railroad crossing and a traveler on the public highway desiring to cross the railroad track at the crossing involves reciprocal rights and obligations. The railroad company's trains have the right of way, and persons on the highway should give precedence to the passing trains. It is as much the duty of a person traveling upon the highway who is about to cross a railroad track to use "ordinary care and prudence" to ascertain if a train is approaching upon the track as it is the duty of the railroad company to warn by appropriate signals all persons who may be upon the public highway of the approach of a train which is about to cross the public highway."

(16) ..... The railroad company's employees in charge of an approaching train should use all ordinary and reasonable care to avoid injury to a traveler on the highway desiring to cross the track, while the latter must use at least as high degree of care to avoid injury to himself; and the degree of care required depends necessarily upon the conditions existing at each crossing at the moment when a train is approaching it."

and

"The question of negligence in the operation of a train is one which must be resolved by a consideration of many things. The condition of the machinery and track in relation to the speed at which the train is driven; the environment at the point of the accident where it occurred at a crossing; the speed of the train

> in relation to the fixed or temporary environment at the spot where the accident occurred; the signals given of the train's approach—are matters to be considered in determining the question whether the train was operated negligently. The phrase 'all ordinary and reasonable care' is susceptible of no hard and fast definition. What may be ordinary and reasonable care in some circumstances may not be so in another case; and where ordinary and reasonable care is not exercised the presumption of negligence of course is not overcome. Negligence has been defined by this court to be the failure to observe for the protection of another's interest such care, precaution and vigilance as the *circumstances* justly demand, and the want of which causes him injury."

In the *Watkins* case, the Supreme Court of Florida goes even further than the decision in the *Pidd* case in protecting the motorists at crossings and says that:

> "A mere perfunctory blowing of a whistle and ringing of a bell at or near a crossing to give warning of an approaching train where it is being driven under such circumstances and at such speed as to reduce the so-called warning of its approach to its minimum value for the prevention of injury to a traveler on the highway desiring to cross the track of the railroad may not be sufficient to discharge the obligation of the railroad company at such time and place."

Can fair minds find any distinction between the holdings in the *Pidd* and *Watkins* cases, other than perhaps

that the Circuit Court of Appeals decision is more favorable to the railroads.

In *Loftin v. Deal, 154 Florida Reports, page 489,* the Supreme Court of Florida permitted recovery solely on question of train speed, in face of unquestionable negligence of plaintiff. In this case, driver was familiar with the crossing, having just left platform of railroad company which was along the track. The electric flashing signals were working, a car stopped on the opposite side of the track and tried to warn deceased of approaching train, the train whistle was blowing, the crossing was obstructed, but the court held solely on the question of speed of train, that the question of relative negligence of parties was for jury, and a verdict for one half of damages sustained was upheld. This case is more liberal to motorists than *Pidd* case.

In *Anderson v. Crawford, 149 Southern Reporter, page 656 (1933),* the rules as laid down in *Pidd* case are applied, and in face of a jury verdict for defendant railroad company, the Supreme Court of Florida reversed the case on the ground that court did not permit jury to consider defendant's speed as constituting actionable negligence.

In case of *Florida East Coast Railroad Company v. Townsend, 140 Southern 196,* a verdict for diminished damages for plaintiff was upheld, although he was driving auto over familiar view-obstructed crossing, without stopping, looking and listening, or taking reasonable precautions, it being held that railroad was bound to know obstructions to view of approaching vehicles near cross-

ing and should have given warnings commensurate with dangers arising from obstructions.

In *Seaboard Air Line Railroad Company v. Bowles, 37 Southern 2d. Reporter, page 578 (Florida-1948),* although the automobile driver knew of the crossing, and took no precautions whatsoever in approaching it, and the stop, look and listen rule was invoked, a verdict for fifty percent diminished damages was approved due to contributory negligence on the part of the defendant. The Fifth Circuit Court of Appeals has not not affirmed any verdict with negligence on the part of plaintiff as great as in this case.

The railroad has made the same contentions here as it made in the recent case of *Atlantic Coast Line Railroad Company v. Smith,* (Fla.), 53 So. 2d 301, decided June 29, 1951. In affirming a judgment for the plaintiff for personal injuries received in a collision between the defendant's locomotive and the plaintiff's automobile at a heavily traveled and obstructed crossing, the Supreme Court of Florida said:

> "Appellant contends that the speed of its train at the time of the accident was under control, that it was ringing the bell and sounding the whistle and that since all evidence to the contrary was negative, it should have been held to be exercising reasonable care. To support this contention it relies on Seaboard Air Line Ry. Co. v. Myrick, 91 Fla. 918, 109 So. 193. It is further contended that the judgment should be reversed because defendant brought itself within the rule announced in Atlantic Coast Line R. Co. v.

Timmons, 160 Fla. 754, 36 So. 2d 430; St. Louis-San Francisco Ry. Co. v. Earl and Baker, Fla., 49 So. 2d 324; Atlantic Coast Line R. Co. v. Price, Fla., 46 So. 2d 481, and similar cases."

After pointing out that the last cited cases (here also relied on by the railroad) did not necessarily govern a crossing where pedestrians and cars were constantly crossing and danger was potential at all times of the day, the Court said:

"The care required under such circumstances is one of degree and must be commensurate with the danger prevalent at the crossing. It may not always be enough to blow the whistle and ring the bell, particularly is this true where the tracks of defendant are in a congested area where the vision is obstructed and various and sundry noises and other distractions are prevalent."

The standard of care laid down in the *Smith* case, 53 So. 2d 301, which is one of most recent of the Florida Appellate courts, spells out and places a clearer responsibility on railroads at grade crossings than is laid down in any decisions of Fifth Circuit Court of Appeals, in that it takes into account, in measuring the care to be exercised by railroad at crossing "various and sundry noises and other distractions prevalent" which would embrace in our case the distractions of road intersection just east of crossing, commercial signs, state parks, service stations, fruit inspection station, etc.

In the *Smith* case, the Florida Supreme Court cites with approval and in support of its decision the Court of

Appeals decision in the *Lowrey* case, which is one of the three late Circuit Court cases brought under attack by petitioner. Since the Florida Court recognizes in *Lowrey* no departure from its standard of care and has expressly approved that decision, petitioner's position on "inconsistent" standards plainly is untenable.

We have in *Smith* case not only an approval by the Florida Supreme Court of Circuit Court standards of conduct by comparison, but by specific expression.

Several months before the *Pidd* case was decided, and, therefore, not influenced by its alleged far reaching evils, in January, 1952, the Florida Supreme Court in *Seaboard Air Line RR Company v. Martin, 56 So. 2d 509,* went far beyond the ambit of any Circuit Court of Appeals ruling in approving a verdict for $35,000 for a 45 year old farmer.

The *Martin* accident was at a rural crossing, but not in a rural community, and was *not* at crossing over which heavy traffic flowed. The motorist was thoroughly familiar with the crossing, living less than 2000 feet from same. The motorist never increased nor decreased his speed as he drove into the train from the time he turned into the road which leads to the crossing, a distance of some 126 feet. There were no obstructions to the crossing. The train crew fixed the speed at 50 miles per hour, just as in our case, although the physical facts indicated it was going much faster, as in our case. The engineer said he never saw the truck, but the fireman signaled its presence to him about 100 feet of the crossing, but too

late to be of any avail. The fireman had seen the truck for several hundred feet, and the court said that:

> "Certainly the jury had a right to believe that the engineer could have and should have done something within the several hundred feet to have further reduced the speed of the train."

May we say here that Circuit Judge Strum, who participated in both the *Pidd* and *Joiner* cases served as Justice of the Supreme Court of Florida for many years prior to his appointment as United States District Judge for the Southern District of Florida, and was and is thoroughly familiar with the standards of care laid down by the Florida appellate courts in grade crossing accidents having participated in numbers of such cases while on the Florida Supreme Court bench, and as District Judge for the Southern District of Florida.

CASES IN WHICH FLORIDA SUPREME COURT IS MORE LIBERAL WITH RIGHTS OF MOTORISTS THAN CIRCUIT COURT OF APPEALS.

In *Foxworth case* (25 So. 338—1899) the Supreme Court of Florida expressly held that a "railroad company operating its trains on the thoroughfare of a village (such as in our case) must use greater care than in less frequented localities, and any neglect of any precautions proper in the peculiar circumstances of the locality constitutes negligence."

In the *Watkins* case, (121 So. 95—1929) the Florida Appellate courts first laid down the proper and fair rule that the perfunctory blowing of whistle and ringing of

bell at or near crossing to give warning of approaching railroad train may not be sufficient at all times and under all circumstances to discharge railroad's obligations, especially where there are obstructions.

In *Lofton v. Deal,* 154 Florida, page 489, the principle was laid down that the speed of train could be considered as actionable negligence even where driver of motor vehicle was familiar with crossing, having just left platform of railroad company which was along track, railroad automatic flash signals were working, train whistle blowing, and car on opposite side of track from driver involved in accident was attempting to warn of train's approach. No Circuit Court of Appeals case has dealt as liberally with motorist as in this case of the Florida Supreme Court.

In the *Smith* case, 53 So. 2d 301—1951, the degree of care to be exercised by railroad in approaching crossing was extended and spelled out by Florida Supreme Court to require that they take into account "various and sundry noises and other distractions (which) are prevalent" at the crossing. The Circuit Court of Appeals has not gone this far in its requirements of trains in approaching crossings.

In the *Martin case, 56 So. 2d 509—1952,* plaintiff was excused in approaching an open crossing, with which he was familiar, and without checking his speed in any way, or stopping, looking or listening, on the theory the railroad could have seen him several hundred feet from the crossing, and *at least checked its speed.*

The above and other similar cases completely dissipate contentions of petitioner that the Court of Appeals has laid down standards which render ineffective the "more reasonable requirements of the Florida cases on the subject," and we have the idea that if petitioner were not "forced into the corner" of last resort in criticizing the Court of Appeals' decisions as inconsistent with Florida decisions, they would much prefer to conduct the operations of their railroad under the standards of conduct laid down by the former, rather than under the standards laid down by the Florida Supreme Court, all of which demonstrates the frivolity of their present petition.

Petitioner complains that the rulings in the *Lowrey, Pidd* and *Joiner* cases were in total disregard of holdings in *ACL Railroad Co. v. Timmons, 36 So. 2d 430; St. Louis-San Francisco Ry. Co. v. Baker, 49 So. 2d 324; Powell v. Gary, 146 Florida, page 334, Florida East Coast Ry. Co. v. Davis, 96 Fla. 171;* and *Covington v. Seaboard Air Line Railroad Company, 99 Florida 1102.*

We find no fault with the holdings in these cases, as the principles therein are in accord with the holdings of the Fifth Circuit Court of Appeals cases, even the maligned *Lowrey, Pidd* and *Joiner* cases. Different results came about in the Florida cases above cited because the facts applied to the same rules were entirely different. In these cases, there was an element of knowledge on the part of motorist of crossing, and lack of obstructions at crossings, which distinguish them from our case, and the *Pidd* case on the facts, but the standards of care and conduct against which the facts were applied were not different.

CONSISTENCY OF FIFTH CIRCUIT CASES.

In *1930*, the Fifth Circuit Court of Appeals in *Kirch v. Atlantic Coast Line Railroad Company, 38 F. 2d 963,* upheld the constitutionality of the presumption of negligence statute against railroads in grade crossing accidents, and dealing with the principles of law applicable to the facts of the case stated:

> "Although there was no direct evidence as to the speed of the train, the violence of the collision and the distance it traveled before it could be stopped were circumstances tending to prove that its speed was such as to impose a duty to give warning of its approach to the crossing."

In *1931*, the Fifth Circuit Court of Appeals in *Claughton v. Atlantic Coast Line Railroad Company, 47 F. 2d 679* applied principles similar to those followed in the *Lowrey, Pidd* and *Joiner* cases, and we would particularly point out that one of the factors of negligence charged to railroad in this case was that *it did not have the train under such control that it could stop at the crossing.* The burden of petitioner's brief in support of granting certiorari is spent in blaspheming the idea that a railroad should be required to have its trains under control so that they could be stopped at crossings, irrespective of environment and circumstances thereat. We note here that this sound safeguard is not newly hatched in the *Lowrey, Pidd* and *Joiner* cases but has the vintage of over two decades, and was wise then, and is almost a necessary safeguard now with increased motor vehicular traffic at most all grade crossings.

In *1935*, the same case was again before Fifth Circuit Court of Appeals (75 F. 2d 626) and verdict for plaintiff was affirmed, and it was held that regardless of speed of motorist, or his carelessness, if the train was traveling at excessive speed, question for jury.

In *1933* in the case of *Stringfellow v. Atlantic Coast Line Railroad Company (64 F. 2d 173)*, later carried to U. S. Supreme Court, and remanded for further consideration to Fifth Circuit Court of Appeals, (290 U. S. 322) and finally determined by latter court (67 F. 2d 1012) it was held that defendant railroad company, under Florida statutes, had no complete defense except to prove that in fact motorist alone, and it in no degree caused his injury.

The *Lowrey, Pidd* and *Joiner* cases certainly do no violence to the ruling in *Stringfellow* case, which is of some twenty years ago and is predicated on holdings of United States Supreme Court.

In *1936*, the Fifth Circuit Court of Appeals applied rules similar to those in *Lowrey, Pidd* and *Joiner* to facts in case of *Atlantic Coast Line Railroad Company v. McKinley, 84 F. 2d 626*, and affirmed verdict for defendant, and excused railroad against charge of appeal being frivolous only on ground that the earnestness of its argument showed it not thus.

In *1940*, in case of *Van Allen v. Atlantic Coast Line Railroad Company, 109 F. 2d, page 780*, the Fifth Circuit Court of Appeals affirmed a directed verdict for the defendant railroad company, and in doing so it acted in ac-

cord with principles of reciprocal obligations of train and motorist at grade crossings as laid down in *Lowrey, Pidd* and *Joiner*. The facts show that one completely familiar with crossing ran in front of train without any effort to see or avoid it. We find no fault with this decision.

In *1942*, in *Smith v. ACL RR Company, 127 F. 2d 798*, verdict directed for defendant railroad company and reversed, and when retried verdict for plaintiff was affirmed, ACL RR Company, 135 F. 2d 40. The rules of the *Lowrey* and *Pidd* cases were applied in these cases.

In *1942*, in *Autz v. Powell, 125 F. 2d 768*, and in *1944* in *Good v. ACL RR Co. 142 F. 2d 46*, the Fifth Circuit Court of Appeals affirmed verdicts directed for defendant railroad company. Both of these cases involved train already standing on crossing, and the decisions were correct, and are not out of accord with *Lowrey, Pidd* and *Joiner* cases.

In *1948* we have the *Lowrey* case which is criticized in petitioner's brief, by aligning it with the condemned *Pidd* case. We cannot find that the *Lowrey* case strays away from Florida or Fifth Circuit precedents.

In *1950* in *Atlantic Coast Line RR Company v. Hadlock, 180 F. 2d 105*, the same principles laid down in *Lowrey, Pidd* and *Joiner*, were applied, and Judge Sibley laid down the proposition that when both train and car approach crossing too fast, the law would award no absolute priority to the one arriving first.

In *1950* in *Atlantic Coast Line RR Co. v. Soffer, 184 F. 2d 842*, judgment for plaintiff affirmed, it being held that in

diversity cases involving grade crossing accidents, Court of Appeals bound by Florida statutes, and further in cases where both parties are negligent, but negligence of neither was wilful or wanton, question of proximate cause was for jury. There is nothing out of accord with *Lowrey, Pidd* and *Joiner* decisions in this case.

In *1951* in *Seaboard Air Line Railroad Company v. Bailey* the Fifth Circuit Court of Appeals reversed a verdict for plaintiff because court committed error in charge. In stating the facts of the case, Judge Strum pointed out that "The fireman, sitting on the left in the cab of the train, was approximately 350 feet away, south of the crossing, within which distance, the train could have been substantially slowed, if not stopped."

Then in *1952*, we have the *Pidd* case, and in *1953* the *Joiner* case.

In reviewing these cases, which are all of the cases of Fifth Circuit Court of Appeals interpreting Florida statutes and decisions pertinent to our case, we find no sudden "change of pace" in the *Lowrey, Pidd* and *Joiner* cases, but there is a consistency from the beginning and they are consistent with the holdings of the Florida Supreme Court with the qualification that they are more favorable to the railroad than are Florida Supreme Court decisions, which have been involuntarily adopted by petitioner for the purposes of this move as being "reasonable requirements."

There is absolutely no merit in the contention that the Fifth Circuit Court of Appeals has laid down standard of

care at grade crossings inconsistent with those laid down by Florida Supreme Court, certainly not an unfavorable inconsistency in so far as petitioner's interests are concerned.

PETITIONER'S COMPLAINT THAT SUPREME COURT HAS NOT RECENTLY CONSIDERED ANY GRADE CROSSING CASES.

Complaint is made that the Supreme Court has not considered a grade crossing case since 1934 since when transportation speeds have increased everywhere due to the pressure of insistent public demand with the intimation the rules should be readjusted in issues between trains and motorists at grade crossings to eliminate all restrictions of speed which have heretofore been applied to railroads.

It would seem that the last thing the railroads would desire would be a realignment of the rules to fit the exigences of today's travel, which is preponderately by motor vehicle. Railroads are operating under beneficient rules in so far as they are concerned which were made when rail travel was predominant, and motor vehicle travel was almost nonexistent. There was then nothing inequitable or unfair in requiring one or two cars a day to stop, look and listen for twenty or thirty trains. But the facts in our case plainly illustrate the inequities of the present rule when some 2500 vehicles each day, carrying perhaps 10,000 passengers, are required to stop, look and listen for four trains per day which have the right of way, subject to the wise rules laid down by Florida Supreme

Court that they shall conduct themselves with the care commensurate with the dangers known to prevail at each crossing. The railroads should content themselves that they are not more prudently restricted.

We find some paradox in the position of petitioner in urging that due to increased demands for speed that limitations be taken off of railroads over against its position in case of *Atantic Coast Line RR Company v. Ivey, 5 So. 2d 244,* when they were earnestly and successfully urging upon the Supreme Court of Florida facts with reference to increase of motor vehicular traffic through the years, as against rail travel, which is repugnant to the spirit of their present plea, and is convincing that rather than unleash the railroads as to speed in their operations, due to increase in motor vehicular traffic, and dangers at crossings, the speed should be limited, and railroads required to stop or else install protective automatic equipment.

We take brief excerpt from their plea in the *Ivey* case to prove our contention that the present rules are one sided in favor of railroads, as follows:

"In the year 1899 when said statutes (that under attack with reference to fencing right of way against livestock) were passed, there were no paved highways in the State of Florida, no automobiles, no motor busses, no motor trucks, and substantially all the freight and passenger traffic into, in and out of the State of Florida was transported by railroads; today (1941) there are many thousands of paved highways in Florida, thousands of automobiles, and hundreds of motor busses and motor trucks

carrying and transporting daily, besides their operators, property of great value and thousands of passengers at rates of speed fairly comparable to, and in many instances, exceeding, the rate of speed at which the defendant operates its trains; . . . .

Assume that at present time the proportion of motor vehicles in use as against trains was in direct reverse to situation at the turn of the century, that is, all motor vehicles and no trains. Would the rule then be fair which gave to train right of way, and would require motor vehicles on highways to stop, look and listen for something which did not exist—?

We cannot conceive that to realign the rules would be favorable to the railroads, and justly so.

Anent the increased use of motor vehicles we find the highways are here and there graced with motor vehicular freight vans which proudly bear the colors and insignia of the Atlantic Coast Line Railroad Company, which certainly denotes the trend.

HIGH RATE OF SPEED AT SUBJECT CROSSING WHOLLY UNNECESSARY.

Petitioner's charge that it is necessary to use high speed to maintain schedules in order to accommodate the commerce of the nation certainly has no force in this particular case.

It was wholly unnecessary to maintain a high and increasing speed at this crossing. The train had to slow down at the wye switch about a mile North of Fannin Springs crossing to around 40 miles per hour according to train crew, and had they continued to slow down for the next mile and on across the Fannin Springs crossing, they could have approached it with safety to motorists and at the same time not discommoded its schedule over a minute or two. On this particular morning they were over two hours late.

When we take into consideration the testimony of the Engineer Cooper (R. 275) that he could not increase his speed until he had cleared the last of 14 cars from the wye switch, then the distance at which he would have had to travel cautiously and prudently is considerably reduced, with the time lost on schedule reduced to practically nil.

THE ASSERTED CONFLICT ARISES ONLY FROM DIFFERENCES IN STATES OF FACT AND NOT FROM THE APPLICATION OF ANY PRINCIPLE OF LAW.

Any review of this case necessarily depends upon a detailed and extensive analysis by the Court of the particular facts herein involved. That the railroad simply seeks in this Court another hearing, where it may again obtain a review of the evidence and discuss its own interpretation of and inferences from the facts, is apparent. The conflict in standards asserted by petitioner does not arise in the application of any principle of law; the only

conflict in decisions shown by petitioner arises solely from differences in states of fact.

Nor does this case involve questions or principles which are important in the public or national interest. No persons will be affected by its outcome except the litigants themselves. All the Court of Appeals has said is that on the particular occasion of this accident, at this specific crossing and under the peculiar facts, circumstances and environment shown, the jury was authorized in finding that petitioner did not use the necessary reasonable care required of it. The decision will and can have no bearing on any other accident at the same crossing where different facts and circumstances necessarily will be involved, nor even remotely affect any other crossing of petitioner or any other railroad.

Under this Court's established principles, we respectfully submit that petitioner has not made a case for the granting of certiorari. *United States v. Johnston, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925; Magnum Import Company v. Coty, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922; United States v. Johnson, 319 U. S. 503, 518, 63 S. Ct. 1233, 87 L. Ed. 1546; Faulkner v. Gibbs, 338 U. S. 267, 268, 70 S. Ct. 25, 94 L. Ed. 62; Wisconsin Electric Company v. Dumore Company, 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728; Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712.*

CONCLUSION.

For the reasons shown above, the petition for writ of certiorari should be in all respects denied.

November ...., 1953.

Respectfully submitted,

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